IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 01/03/2004

CORAM

THE HONOURABLE MR.JUSTICE M.CHOCKALINGAM

SECOND APPEAL No.941 of 1993

1. Chinnaraju Asari
2. Saraswathi Ammal .. Appellants

-vs-

Kamsalai Ammal .. Respondent

This second appeal is preferred under Sec.100 of the Code of Civil Procedure against the judgment and decree dated 16.3.1993 and made in A.S.No.45 of 1992 on the file of the Principal Subordinate Court, Cuddalore, confirming the judgment and decree dated 21.10.1991 and made in O.S.No.384 of 1977 on the file of the Principal District Munsif Court, Cuddalore.

!For Appellants : Mrs.Chitra Sampath

^For Respondent : Mr.Badri Narayanan
for Mr.S.Sampathkumar

:JUDGMENT

The defendants in a suit for permanent injunction and mandatory injunction, whose defence plea was rejected by both the Courts below, have brought forth this second appeal.

2. The respondent/plaintiff sought the relief of declaration of the right of easement to the plaintiff to use the suit property for the purpose of scavenger going and cleaning the latrine of the plaintiff' s house and to drain the drainage water and as a passage to reach T.S.No.508. along with the relief of permanent injunction and also mandatory injunction for removal of the fence at AD in the plaint plan with the following averments.
The suit property is a lane measuring 135 + feet east-west and 6 , feet north-south, which has been shown as ABCD in the plaint plan. The said lane is comprised in T.S.No.506. The plaintiff and her predecessor-in-title have been in occupation of the northern half of the lane, while the defendants and their predecessor were in enjoyment of the only southern half of the lane. The northern half of the lane is adjoining to the south of Door Nos.29 and 30, measuring 3 1/8' north-south and 145 + ' east-west. A drain is also running along with the portion of the lane. It is the only way, by which the drainage water can be drained, and the plaintiff can reach the property, situated on the east of the Door No.30 i.e. in Survey No.508. The defendants filed a

suit in O.S.No.823 of 1965 on the file of the said Court for declaration and injunction restraining the plaintiff from interfering with the defendants' enjoyment. In the said suit, the suit property, what was shown as item 2, was T.S.No.508. The Court of the District Munsif decreed the suit on 25.7.1967. As against the decree, the plaintiff took the matter on appeal in A.S.No.264 of 1967 on the file of the Sub Court, Cuddalore. The first appellate Court granted a decree dated 20.3.1973, stating that the declaration and injunction by the lower Court were subject to the plaintiff taking a scavenger to the latrine through the suit lane. The defendants took the matter on appeal before the High Court in S.A.No.507 of 1973, wherein the appeal was allowed on 4.2.1976, and the modification done by the first appellate Court in respect of the item No.1 was set aside, and in respect of item No.1, the defendants therein were given liberty to take appropriate proceedings if they were so advised to enforce the right of easement. In such circumstances, the instant suit is brought forth by the defendant in that suit, who is the plaintiff herein. The plaintiff herein cannot reach the property in T.S.No.508, except through the lane. Apart from that, the scavenger cannot go to door No.20, which is the property of the plaintiff, to clean the latrine, except through the lane, and the drainage water had to be drained only through the suit property. Except this way, there was no way, by which the scavenger can reach the plaintiff's property situated in T.S.No.506, and the drainage water cannot also be drained by any other way. She also cannot reach the property situated in T.S.No.508. Hence, it is absolutely essential as an easement of necessity. In any event, the plaintiff and her predecessor in title by long user have prescribed title by adverse possession. Taking advantage of the judgment of the High Court, the defendants have put up a fence in AD, and thus, they have prevented the plaintiff from using the lane. The drainage water completely got stagnated, since the defendants have blocked the way. The plaintiff was not in a position to drain the drainage water, nor was she in a position to reach the property in T.S.508, and hence, there arose a necessity for filing the suit for the said relief.

3. The suit was vehemently resisted by the defendants, stating that the allegation that the drainage water has to be drained through the suit lane, and the plaintiff has no other way to drain the same is denied; that since the plaintiff has no title to the property in T.S. No.508, she cannot have the benefit of the suit lane to reach the said property; that neither the plaintiff nor her predecessor-in-title has been in possession and enjoyment of the property in T.S.No.508; that the plaintiff's claim over the property in T.S.508 has been negatived by the Courts in the proceedings in O.S.No.823/65; that it has also been held by the High Court that if at all the plaintiff has any right, she can well agitate the same before the Civil Court; that if really the plaintiff is entitled to the suit lane, then she would have asked the same in the said suit itself; but, she has not done so; that the claim now made by the plaintiff, cannot be sustained; that it is denied that the defendants have put up a fence at AD; that the draining of drainage water is not an esementary right; that the defendants were conducting business in the suit property for the past 40 years; that during this period, neither the plaintiff nor her predecessorin-title was allowed to go through the said lane; that the plaintiff is not entitled to any relief, and hence, the suit was to be dismissed.

4. The trial Court framed the necessary issues, tried the suit and

granted the relief asked for. Aggrieved, the defendants took it on appeal. The first appellate Court also confirmed the judgment of the trial Court, wherein the reliefs were granted. The aggrieved defendants have brought forth this second appeal.

5. At the time of admission, the following substantial questions of law were formulated by this Court:

(1) Whether the learned Subordinate Judge was right in holding that the plaintiff could claim right of easement along with her claim for title?

(2) Whether the learned Subordinate Judge was right in holding that the suit was not barred by limitation?

6. This Court paid its full attention on the submissions made by the learned Counsel for the appellants and also the learned Counsel for the respondent on those contentions and had a thorough scrutiny of the materials available.

7. As pointed out above, the subject matter of litigation is a small lane, situated on the south of the properties, bearing door Nos.29 and 30 and belonging to the plaintiff and the defendants respectively. The plaintiff has sough for a declaration of right of easement to use the suit property for the purpose of scavenger going and cleaning the latrine of the plaintiff's house and to drain the drainage water and also as a passage to reach the property in T.S.508, which is situated on the east of door No.30. This is the second round of litigation between the parties. On the earlier occasion, there was a suit filed by the appellants/defendants in O.S.No.823/65 on the file of the very same District Munsiff Court, wherein the defendants sought for declaration of title in respect of the immovable properties shown as items 1 and 2 therein and for a consequential injunction. It is pertinent to note that the subject matter of the present litigation namely the lane, was also the subject matter in that suit. The present plaintiff as defendant in that suit raised a plea that the lane exclusively belonged to her and her predecessor-in-title, and they have prescribed title by adverse possession. After trial, the said suit was decreed in favour of the plaintiffs therein. The defendant therein took it on appeal, wherein the title of the plaintiffs therein over the item No.1 was affirmed by the first appellate Court in entirety. But, the first appellate Court had granted the relief of declaration and injunction subject to the right of the defendant therein draining the drainage water through the suit lane and taking a scavenger to clean the latrine through the lane. That apart, the first appellate Court in that appeal has also found that the defendants herein were entitled to only 300 square feet in T.S.NO.508 and not in entirety. Aggrieved over the said judgment of the first appellate Court, the defendants herein took it on appeal in S.A.No.507 of 1973, wherein it was observed by this Court as follows:

"If the defendants want to claim right of easement over item 1 of the property, it can be only on the basis that item 1 of the suit property belonged to the plaintiff because no one can claim a right of easement over his own property. Therefore the modification directed by the learned Subordinate Judge in respect of item 1 of the said property is set aside making it clear that it is certainly open to the defendants to establish any easementary right they may have in respect of item 1 of the said property on the basis that the title to that item vests only with the plaintiffs."

Thus, it would be clear that the claim of the plaintiff that they have got

title to the suit property i.e. the lane, was negatived. There is clear averment in the plaint that the present suit has been brought forth in view of the observations made by this Court on the earlier occasion in S.A.No.507/73. Hence, what are all required to be decided in the instant case was whether the plaintiff has properly pleaded and proved the easement of necessity as asked for.

8. After the disposal of the suit by the District Munsif on the first occasion, an appeal was filed, and the same was also remanded by the first appellate Court with a specific direction that the lower Court has not paid its attention as to the actual lie of the properties and has also not considered the easementary right whether available to the plaintiff in the suit property. In such circumstance, an Advocate Commissioner was also appointed by the lower Court, who made an inspection of the property and filed a report. Pursuant to the same, an additional written statement has also been filed. As could be seen from the available materials, the grievance of the plaintiff seems to be a raising of a wall, which is shown in the Commissioner's report as AD and which is situated on the west of the suit property. It has been specifically pleaded in the plaint that taking advantage of the judgment of this Court in the earlier second appeal, a wall has been raised by the defendants at the AD point. But, the case of the defendants before the trial Court was that the said wall came into existence even in the year 1972, and the same is evidenced by Ex.B3, blue print. A perusal of Ex.B3 would make it abundantly clear that in the portion of the lane, the defendants had constructed a shed, wherein they are conducting their workshop, and it is being run. But, the instant suit was filed in the year 1977, and hence, it casts a doubt whether the plaintiff has brought forth the suit in time, stating that there was no laches on her part to seek for a mandatory injunction. At this juncture, it remains to be stated that the plaintiff has defended the earlier suit stating that the ABCD lane exclusively belonged to them and claiming half of the lane on the northern side. Having given up her earlier stand, she has come forward seeking for easement of necessity. Nowhere, she has whispered in the earlier defence that she had the right of easement of necessity, and thus, this Court is able to see an inconsistent stand.

9. It is the case of the plaintiff that the suit lane was the only way to reach the property in Survey No.508. As rightly pointed out by the learned Counsel for the appellants, the plaintiff has not filed any documents to show that she was entitled to any part of T.S.508. The question as to the title of the plaintiff in respect of T.S.508 does not require any consideration, however, to the limited extent. When the plaintiff has come forward with the suit that in order to reach T.S.508, ABCD suit lane is the only available way, a duty is cast upon the plaintiff to show that she has got the property in T.S.508. In the instant case, the plaintiff has not proved that she has got title to any property in T.S.508. In view of the available evidence, her grievance that the suit lane was the o nly possible way to take the scavenger to remove the night soil and to drain the drainage water, and the same has also been blocked, cannot be countenanced. Pending the suit, there was an additional written statement filed by the defendants stating that the plaintiff has built a Bombay type latrine at the backyard of Door No.29; that the present type of latrine does not require a scavenger to clear the night soil as it may have been necessary, if there was a dry latrine; and that

the right if at all existed, has become extinguished by virtue of change in the type of latrine and the mode of using of latrine. This additional written statement was not in any way controverted. The learned Counsel for the appellants took the Court through the plan, filed by the Advocate Commissioner. It is clear from the plan that there has been a closed channel that was available inside the house of the plaintiff in Door No.29 , which proceeded from the available latrine to the western street. According to the learned Counsel for the appellants, the Commissioner's report and plan would clearly strengthen the additional written statement filed, which is referred to above. In answer to the above contention, the learned Counsel for the respondent would submit that it was an interim arrangement made by the plaintiff pending the proceedings. Even the plaintiff examined as P.W.1, has not spoken anything about the existing state of affairs. In such circumstances, the averments as to the relief of mandatory injunction and of permanent injunction have been neither properly pleaded nor proved. The learned Counsel for the respondent would submit that the instant suit has been brought forth only on the directions issued by this Court in the earlier second appeal. But, this contention cannot be accepted, since the plaintiff herein, who claimed title to the property in that suit, has miserably failed to prove the same. However, it was observed by this Court in the earlier second appeal that there would not be any impediment for the plaintiff herein to work out the remedies as to the right of easement, if available and if so advised, and the same did not mean that the easementary right was either found to be in her favour or there was a direction to file a suit thereon. In such circumstances, this Court is of the considered view that both the Courts below, without proper pleading as to the easement of necessity and without the necessary proof therefor, have granted the reliefs, which has got to be necessarily set aside by this Court.

10. In the result, this second appeal is allowed, setting aside the judgments and decrees of the lower Courts and leaving the parties to bear their costs.

Index: yes
Internet: yes

To:
1. The Principal Subordinate Judge
Cuddalore
2. The District Munsif
Cuddalore
3. The Record Keeper
V.R. Section
High Court, Madras.

nsv/